

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1962 OF 2004

IN

SUIT NO.1003 OF 2004

1. Rikhiram Tulsiram Arora & others. Plaintiffs.

vs.

1. Rameshkumar Tulsiram Sachdev & others. ... Defendants.

Ms.Rajani Iyer with B.B.Saraf i/b. Thakore Jariwala & Associates, for Plaintiffs.

Mr.P.K.Samdhani i/b. Wadia Gandhi & Co. for Defendant nos.1 & 2.

Mr.S.K.Srivastav i/b. S.K.Srivastava & Co, for Defendant no.3.

Mr.D.D.Madan i/b. T.N.Tripathi, for Defendant nos.4 to 8.

CORAM: D.K.DESHMUKH,J.

DATED: 21st April,2005

P.C.:-

1. This is a Notice of Motion taken out by the plaintiffs. It is common ground that the reliefs that are claimed in this Notice of Motion are related to the property which is described at "Exhibit H" to the plaint. By this Notice of Motion, the plaintiffs claim appointment of Receiver on the property described at Exhibit H, and order of temporary injunction against defendant nos. 1,2 and defendant nos.4 to 8, is also sought. The admitted position is that the property described at Exhibit H was gifted by a registered gift deed by the father of the plaintiff no.1 and defendant no.1 to them, and that they are the joint owners of the property. The suit as originally filed, so far as the property described at Exhibit H is concerned, by prayer clause (e) a decree of partition of the properties mentioned in the prayer clause (e) including the property described at Exhibit H, was sought. It appears that thereafter the plaint was amended twice. By the first amendment in the plaint, it was claimed that the property described at Exhibit H is jointly owned by the plaintiff no.1 and defendant no.1 and that a decree for partition of the property by metes and bounds should be passed. It was claimed that the creation of development rights in the property by defendant no.1 in favour of defendant no.4 is illegal. Thereafter, by the second amendment which was introduced in the

plaint, it was claimed that when the property was gifted by the father of plaintiff no.1 and defendant no.1 to them, it was agreed between plaintiff no.1 and defendant no.1 that each of them will have right of preemption in relation to the undivided share of the other. According to the plaintiffs, as the property described at “Exhibit H” is admittedly jointly held and the property is yet to be partitioned and as the defendant no.1 has created development rights in relation to his rights in the properties in favour of defendant nos. 4 to 8 in breach of the right of preemption of the plaintiff no.1, Receiver should be appointed on the properties or at least an order of temporary injunction should be passed in favour of the plaintiffs, preventing creation of further third party interest in the properties.

2. Normally, in a situation where property is jointly held, is yet to be partitioned and there is a right of preemption given to the plaintiff, the Court would pass an order of temporary injunction restraining the parties from creating third party interest in the property till the suit is decided. Therefore, an enquiry has to be held to find out whether the plaintiffs have established that prima facie (1) the property is jointly held, (2) it is yet to be partitioned and (3) the plaintiffs have a right of preemption. It is an admitted position before me that the property is jointly held by plaintiff no.1 and defendant no.1. It is also an admitted position that the property is yet to be

partitioned and that both the plaintiff no.1 and defendant no.1 have 50% share each in the property. The defendant no.1, in fact, more than once expressed his willingness to submit to a decree of partition as claimed in the suit and for appointment of a Commissioner for effecting the partition. However, so far as the aspect of the right of preemption claimed by the plaintiff no.1 is concerned, there is a serious dispute between the parties. According to the defendant no.1, no such right exists between him and the plaintiff no.1. Therefore, the burden is entirely on the plaintiff no.1 to establish, prima facie, the existence of the right in him. The plaintiffs except for making averments in this regard in the plaint, have not placed any material on record which will even indicate that such a right was ever created. In my opinion, following aspects clearly indicate that the plaintiffs have not established even prima facie existence of the right of preemption, (a) the averments in the plaint in this regard are extremely vague, (b) the right is based on an oral agreement between plaintiff no.1 and defendant no.1, (c) the date, place and time of the agreement is not disclosed anywhere, (d) admittedly, the agreement was not arrived at in the presence of any witnesses, (e) in the correspondence between the parties before the suit was filed, existence of such an agreement is never asserted or even suggested, (f) the plea about existence of right of preemption was not raised in the plaint when the suit was filed. A cause of action for getting a decree of declaration about existence of

a right of preemption would accrue when a suit for a decree of partition of that property is filed, because when shares are separated by metes and bounds pursuant to a preliminary decree each party will take his share subject to the right of preemption of the other, (g) no explanation is given by the plaintiffs as to why, though the cause of action had accrued, the plea was not raised in the plaint, (h) as the plea about existence of the right of preemption was raised when the plaint was amended second time, after the defendant no.1 expressed his willingness to agree to a decree of partition of the property as claimed in the plaint, shows that the plea was raised as an afterthought. Thus, the plaintiffs do not have prima facie case so far as the aspect of the existence of right of preemption is concerned, though it is clear that the property is joint.

3. The order of temporary injunction or order appointing Receiver is always in the discretion of the Court and the Court passes that order in the interest of justice in favour of plaintiff who comes to the Court with clean hands. In my opinion, following conduct of the plaintiff no.1 dis-entitles him to an interim order which is in the discretion of the Court. When the plaintiff no.1 came to the Court, as observed above, claiming that the property described at Exhibit H is the joint property of plaintiff no.1 and defendant no.1, and claimed a decree of partition, the defendant no.1 appeared before the Court and

accepted that plaintiff no.1 and defendant no.1 are the joint owners of the property, each having 50% share in the property and agreed to a decree of partition of the property. It is at that time, that the plaintiffs for the first time introduced the plea of there being a right of preemption. The pleadings in relation to the right of preemption are to be found in paragraph 6(b) of the plaint, which was brought about by the second amendment in the plaint, which reads as under:-

6(b) The Plaintiffs say and submit that it was always agreed and understood between the 1st Plaintiff and 1st Defendant at the time the said properties described in Exhibit B, C and D hereto were gifted to them by their father that either party will have a right of first preemption to purchase and/or acquire the undivided share of the other in the said properties in case he is desirous of selling the same. The plaintiffs say and submit that after the death of the said Tulsiram Nathumal Plaintiff no.1 and Defendant no.1 once again confirmed that neither party will sell and/or assign or transfer his right, title or interest in the said properties save and except in favour of the family concerns/family trust and in case it is become necessary for either party to sell and/or dispose of

his undivided share in the said properties, the other party will have the first right of preemption to purchase and/or acquire the said share at the price offered to him.”

Perusal of these averments shows that the averments are absolutely vague, they do not give any particulars, and the agreement alleged is a oral agreement, no date, time and place have been mentioned. It is admitted before me that no witnesses were present at the time of the alleged agreement. It is further pertinent to note that the alleged oral agreement of preemption is pleaded for the first time in the second amendment in the plaint. It is not found to be mentioned in any correspondence between the parties before the suit was instituted. I have serious doubt whether on such pleadings any evidence would be admissible. To my mind, it is clear that this case of preemption has been pleaded as an afterthought, just to prevent a decree of partition being passed. The whole intention of the plaintiff appears to be to obtain an order of temporary injunction or an order appointing Receiver on the property so that the entire property can be blocked and loss is caused to defendant no.1 and defendant nos.4 to 8. In my opinion, had there been really an agreement for preemption, even oral agreement for preemption as observed above, that would have been disclosed in the plaint when the suit for a decree of partition was filed.

It is pertinent to note here that by prayer clause (f) of the plaint in its original form, a prayer for temporary injunction restraining defendants from transferring the properties including the property described at Exhibit H, was made. Surely, had there been an agreement for preemption, that fact would have been mentioned in support of the case of the plaintiffs for grant of temporary injunction restraining the defendants from transferring the properties. I do not find any explanation given by the plaintiffs for not raising the plea in the original plaint. This clearly demonstrates that the plea of preemption is an afterthought and has been taken with the sole objective of blocking the passing of a decree for partition of the properties which the plaintiffs themselves are claiming. As the defendant no.1 has agreed, in the absence of the plea regarding the alleged right of preemption, the Court would have, immediately passed a preliminary decree for partition of the property and would have initiated proceedings for a final decree. But, it appears that the plaintiffs were not really interested in a decree for partition. Their real object was to obtain an interim order from the Court so that difficulty would be created in the way of defendant nos. 4 to 8 which will force them to transfer the property to the plaintiffs. The whole object of the plaintiffs appears to be to secure the entire property for themselves and for achieving this objective, they want to use an order passed by the Court. Before me, it was stated more than once that the plaintiffs are willing to pay to

defendant no.1 more price for his share in the property than what he has received from defendant nos. 4 to 8. Thus, the plaintiffs desire to use the process of the Court to force the defendants to agree to the desires of the plaintiffs. The question is would the Court permit the plaintiffs to use its process for this purpose. In my opinion, the answer has to be emphatically 'no'. In my opinion, above narrated conduct of the plaintiffs amounts to abusing the process of the Court. In the result, therefore, in my opinion, the conduct of the plaintiffs disentitles them to any interim order which is in the discretion of the court. The Notice of Motion is therefore, disposed of. It is however directed that if the defendants create any third party rights in the property described at Exhibit H, they will specifically give notice in writing to the persons in whose favour the third party rights are to be created, that creation of rights in their favour is subject to the result of this suit. The plaintiffs shall pay costs of this motion to defendant no.1 and defendant nos.4 to 8 as incurred by them.

4. At this stage, a request is made that ad-interim order of status quo be continued. As I have been found that the plaintiffs have made an attempt to abuse the process of the Court, in my opinion, it will not be appropriate to continue any ad-interim order. The request is rejected.

